



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

MILLER LAW GROUP, PLLC
25 STEVENS AVENUE
WEST LAWN PA 19609

COPY MAILED

SEP 08 2008

OFFICE OF PETITIONS

In re Application of	:	
Joseph C. Hurlburt	:	DECISION VACATING PRIOR
Application No.: 10/729896	:	DECISION;
Filing or 371(c) Date: 12/08/2003	:	DISMISSING PETITION UNDER
Title of Invention: TRAILER HAVING	:	37 CFR 1.181 and GRANTING
TILT AND DUMP FUNCTIONS	:	PETITION UNDER 37 CFR 1.137(a)

This is a decision vacating the Decision on Petition mailed June 12, 2008, in response to a "Petition to Withdraw Holding of Abandonment (37CFR 1.181(a)) and Petition to Revive an Abandoned Application (Under 37 CFR 1.137(b))," filed March 28, 2008. This is also a decision addressing the petition under 37 CFR 1.137(a) filed September 5, 2008.

This Decision on Petition mailed June 12, 2008 is hereby **vacated**.

The petition under 37 CFR 1.181(a) is hereby **dismissed**.

The petition under 37 CFR 1.137(b) is **dismissed**.

The petition under 37 CFR 1.137(a) is **granted**.

Background

The above-identified application became abandoned for failure to timely and properly reply to the final Office action, mailed January 12, 2006. The Office action set a three (3) month period for reply. No response having been received, the application became abandoned on April 13, 2006. A Notice of Abandonment was mailed February 26, 2008.

Applicant filed a "Petition to Withdraw Holding of Abandonment (37CFR 1.181(a)) and Petition to Revive an Abandoned Application (Under 37 CFR 1.137(b))," on March 28, 2008, wherein Applicant asserted that a timely response to the Office action was filed on April 12, 2006. Applicant also averred that prosecution of the application proceeded thereafter, including the mailing by this Office of a non-final Office action on January 30, 2007, and response thereto on April 26, 2007.

A review of Office records revealed that the Examiner had agreed to withdraw the finality of the Office action of January 12, 2006 in an Interview Summary mailed July 21, 2006.

The petition was granted. However, the Interview Summary mailed July 21, 2006, was mailed after the statutory period for reply had expired and the application had become abandoned by operation of law. See, Lorenz v. Finkl, 333 F.2d 885, 889-90, 142 USPQ 26, 29-30 (CCPA 1964); Krahn v. Commissioner, 15 USPQ2d 1823, 1824 (E.D. Va 1990); In re Application of Fischer, 6 USPQ2d 1573, 1574 (Comm'r Pat. 1988).

Review of Office records

A review of Office records reveals that the reply to the Office action filed April 12 and April 13, 2006, failed to place the application in condition for allowance. Applicant was so notified in an Advisory Action, mailed May 3, 2006.

Petition under 37 CFR 1.181(a)

35 U.S.C. § 133, Time for prosecuting application, states:

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Director in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Director that such delay was unavoidable. (Emphasis supplied).

Id.

The use of "shall" in a statute is the language of command, and where the directions of a statute are mandatory, strict compliance with the statutory terms is essential. Farrel Corp. v. U.S. Int'l Trade Comm'n, 942 F.2d 1147, 20 USPQ2d 1912 (Fed. Cir. 1991).

In the present case, a complete and proper reply to the Office action of January 12, 2006 was due on April 12, 2006, and in no case could the period for reply extend beyond July 12, 2006. Thereafter the application was abandoned. The Interview Summary mailed after the application had become abandoned was ineffective to withdraw the abandoned status of the application. In view of the above, the petition to withdraw the holding of abandonment is hereby dismissed.

A Grantable Petition Under 37 CFR 1.137(b)

A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;
- (2) The petition fee as set forth in § 1.17(m);
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and

(4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

The petition fee

As to item (2), Office records reveal that the fee for the petition under 37 CFR 1.137(b), filed with the petition on March 28, 2008, has been refunded to Petitioner. Therefore, this petition must be dismissed since item (2) is lacking.

Petition under 37 CFR 1.137(a)

Given the circumstances of the abandonment of the above-referenced application, the petition under 37 CFR 1.137(a) is granted.

Telephone inquiries concerning this matter should be directed to Attorney Derek Woods at (571) 272-3232.

A handwritten signature in black ink, appearing to read 'Anthony Knight', is written over the printed name.

Anthony Knight
Supervisor
Office of Petitions